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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/666,608	09/18/2003	James Carl Schmidt	66192-0003	1200

20480 7590 03/28/2005

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EXAMINER

WEIER, ANTHONY J

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 03/28/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/666,608

Applicant(s)

SCHMIDT, JAMES CARL

Examiner

Anthony Weier

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 14 February 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-36 is/are pending in the application.
- 4a) Of the above claim(s) 10-36 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### **Election**

1. Applicant's election with traverse of Group I (claims 1-9) in the reply filed on 2/14/05 is acknowledged. The traversal is on the ground(s) that since the groups are classified in the same area, Applicant argues that the search of any one group would encompass the search for the remaining claims. This is not found persuasive because these inventions would require search areas that do not overlap. Moreover, the search strategy differs for the different inventions.

### **Claim Rejections - 35 USC § 103**

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over de Paolis.

De Paolis discloses a high protein nougat material containing soy protein isolate of 3-40 parts, fat of 10-65 parts, sugar substitute of 40-70 parts, and 2-60 parts of various flavorings including vanilla and other ingredients such as fruits and nuts (cols. 2 and 3). Although De Paolis discloses the ranges that would provide for the necessary percentages of ingredients as called for in the instant claims, De Paolis does not set forth a combination of ingredients that match the percentages called for in the instant claims. However, determination of same would

have been well within the purview of a skilled artisan, and it would have been obvious to one having ordinary skill in the art at the time of the invention to have arrived at such amounts as a result effective variables depending on the extent or degree of the results desired.

4. Claims 2-4 and 6-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over de Paolis taken together with Pfeiffer.

The claims call for the sugar substitute to comprise a sugar alcohol and, more specifically, that same is maltitol or a maltitol syrup. However, it is well known to employ maltitol as a sugar substitute in confectionery compositions. It would have been obvious to one having ordinary skill in the art at the time of the invention to have employed said sugar substitute to reduce calories or simply as a matter of preference depending on availability or cost of same.

The claims further call for said protein material to be comprised of whey protein, for example. Pfeiffer further teaches using whey proteins as less expensive milk proteins to aid in providing certain flavors to the confectionery product. In addition, Pfeiffer teaches that whey proteins and other proteins, including soy proteins, may be used in combination (col. 5). It would have been further obvious to have included whey protein for providing a certain flavoring to the confectionery product.

The claims also call for the presence of inulin or oligofructose and in a certain amount. However, Pfeiffer further teaches the inclusion of dietary fiber such as inulin, a known bulking agent, to provide an added health benefit to the confectionery product. It would have been further obvious to have included same for such benefit. Moreover, it would have been further obvious to have arrived at the amount employed in the instant claims as a result effective

Art Unit: 1761

variable depending on the amount of benefit desired.

### Conclusion

5. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

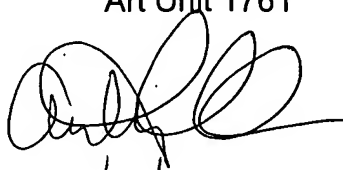
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier  
March 20, 2005

Anthony Weier  
Primary Examiner  
Art Unit 1761

  
3/20/05